STATE OF MICHIGAN

COURT OF APPEALS

DEBRA KAY LONGACRE, also known as DEBRA KAY CHAPO,

Plaintiff-Appellee,

and

KALAMAZOO COUNTY FRIEND OF THE COURT,

Appellee,

v

CLAYTON ERNEST LONGACRE,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 183040
Kalamazoo Circuit Court
LC No. A-784367-DM

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion to set aside the July 25, 1994, post-divorce order in which the court found him in contempt and modified the amount of child support previously ordered. We modify that portion of the July 25, 1994, order regarding the time to which the increased support payments are retroactive. In all other respects we affirm the orders.

Defendant's claim that the friend of the court's petitions were procedurally defective and deprived him of procedural due process is without merit. Defendant did not properly preserve these claims for appeal, raising them for the first time in his misnomered "motion to set aside default judgment," which was untimely filed. MCR 2.119(F)(1). See also MCR 2.116(C)(3) and (D)(1) regarding waiver of service of process claim. However, we will briefly discuss these claims.

In support of his claim that the manner of service of the petitions was improper, defendant relies on MCR 3.203(A) and MCR 2.105. However, defendant's reliance is misplaced because personal jurisdiction over defendant was established in 1978 by virtue of the service of process of the complaint

for divorce. Jurisdiction was merely continued in the instant proceedings. See *Ewing v Bolden*, 194 Mich App 95, 101; 486 NW2d 96 (1992). Because jurisdiction was continuing in the divorce action, service of process under MCR 2.105 was not necessary, only notice to defendant of the petitions. *Id.* Service of the original petition for modification was properly accomplished on defendant pursuant to MCR 2.107(C)(3) by mailing it to him by first class mail. Service by mail is complete at the time of mailing. MCR 2.107(C)(3); *Magnuson v Zadrozny,* 195 Mich App 581, 586; 491 NW2d 258 (1992). Thus, service of the friend of the court's original petition for modification was effected on April 28, 1993, the date of mailing.

We reject defendant's claim that the petitions were procedurally defective and denied him due process because the friend of the court's report and recommendation did not "accompany" the original petition as required in MCL 552.517(4); MSA 25.176(17) [as in effect prior to 1994 PA 37]. When construing statutes, the primary goal is to ascertain and give effect to the intent of the Legislature. *Frame v Nehls,* 452 Mich 171, 176; 550 NW2d 739 (1996). In construing the language of a statute, this Court should apply a reasonable construction in order to accomplish the statute's purpose. *Thompson v Merritt,* 192 Mich App 412, 420; 481 NW2d 735 (1991). The purpose of having the report and recommendation accompany the petition for modification, or to be available for review (which is the requirement under the statute as now amended), is to provide notice to the parties of the specific recommendations being made and the documentation in support of the recommendation. This is designed to allow the parties an opportunity to challenge the reports and recommendation before modification is ordered. Where defendant received the report and recommendation with the amended petition and had ample opportunity to challenge the report and recommendation, he was not denied due process. *Vincencio v Ramirez,* 211 Mich App 501, 504; 536 NW2d 280 (1995).

Defendant's further claim that the amended petition is procedurally defective because the friend of the court did not seek leave of the court under MCR 2.118(A) to file the amended petition is likewise without merit. Defendant errs in relying on MCR 2.118(A), because that rule regards amendments to "pleadings." The petition for modification is not a "pleading." See MCR 3.206, MCR 3.213, MCR 2.110. It is treated as a motion governed by MCR 2.119. See MCR 3.213. Even if the friend of the court was required to seek leave of the court, any error by virtue of its failure to seek leave did not adversely affect defendant's substantial rights. MCR 1.105. The only change in the petition was that the investigation had been completed and the resulting report was attached with specific recommendations.

Defendant's next claim, that the trial court erred in modifying the February 28, 1989 support agreement stipulated between the parties, has no merit. As this Court correctly concluded in defendant's prior appeal in this case, "the trial court had statutory authority to modify the February 28, 1989, stipulation regarding child support." *Longacre v Longacre,* unpublished opinion per curiam of the Court of Appeals, issued 4/26/93 (Docket No. 131479), slip op at 2. See MCL 552.17; MSA 25.97; *Calley v Calley,* 197 Mich App 380, 381 n 1; 496 NW2d 305 (1992). We disagree with defendant's assertion that the trial court "blindly" followed the support guidelines. We note that defendant failed to (1) provide the income information requested of him in the April 19, 1994, subpoena, (2) timely answer the petitions for modification, and (3) appear at the June 17, 1994,

hearing. The amount of support as determined by the child

support guidelines is presumed to be correct. MCR 722.27(2); MSA 25.312(7)(2); *Calley, supra* at 382. As the party challenging the support modification order, defendant failed to carry his burden of showing that application of the formula would be unjust or inappropriate. *Calley, supra; Thompson, supra* at 416. The court specifically noted that the increase of support it ordered could be retroactively modified upon receipt of information from defendant justifying modification. Therefore, defendant can petition the court accordingly. MCL 552.17; MSA 25.97.

Defendant is in error that the court could not order post-majority support, thereby modifying the 1989 support stipulation in this regard. See MCL 552.16a(2); MSA 25.96(1)(2), MCL 552.17a; MSA 25.97(1). Contrary to defendant's claim that only a parent or child can seek post-majority support for a child not on welfare, the friend of the court may initiate such a petition for modification. MCL 552.517(1)(b); MSA 25.176(17). The agreement of the parents is necessary only when post-majority support is to be continued for a period beyond the time constraints set forth in subsection (2) of the statute. See MCL 552.16a(4); MSA 25.96(1)(4).

We agree, however, that the trial court clearly erred in ordering retroactive modification of child support to a time prior to the date the original petition for modification was served on defendant, in this case being April 28, 1993. By the unequivocal terms of MCL 552.603(2); MSA 25.164(3)(2), retroactive modification of support for periods prior to the time that defendant had notice of the petition for modification is prohibited.[1] *Jenerou v Jenerou*, 200 Mich App 265, 267; 503 NW2d 744 (1993); *Edwards v Edwards*, 192 Mich App 559, 564; 481 NW2d 769 (1992); *Waple v Waple*, 179 Mich App 673; 446 NW2d 536 (1989). When a statute's language is clear and unambiguous, then the Legislature is presumed to have intended the meaning it has plainly expressed and the statute must be applied as written. *Nellis v Nellis*, 211 Mich App 226, 230; 535 NW2d 240 (1995). The trial court is directed to modify its July 25, 1994, order to make the modification of support retroactive to April 28, 1993, the date that defendant is deemed to have notice of the petition for modification.

Defendant next asserts that his failure to appear at the June 17, 1994, hearing was due to his inadvertent miscalendaring of the hearing date and that this constituted excusable neglect. He therefore claims that the July 25, 1995, order should be set aside, as in *Cook v Haynes*, 92 Mich App 288; 284 NW2d 479 (1979). Defendant has failed to cite any legal authority in support of his claim that the July 25, 1994, order is a default judgment; he has therefore abandoned his claim in that regard. *Mallard v Hoffinger Industries*, 210 Mich App 282, 286; 533 NW2d 1 (1995). The court correctly characterized the motion as either a motion for rehearing or reconsideration, which was untimely filed pursuant to MCR 2.119(F)(1), or a motion for relief from judgment based on mistake, inadvertence or excusable neglect, which was timely filed pursuant to MCR 2.612(C)(2). Our review of the record reveals that the trial court did not clearly err in this case in finding no excusable neglect in defendant's failure to appear at the June 17, 1994, hearing. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). There being no excusable neglect, the trial court did not abuse its discretion in denying defendant's motion to set aside the July 25, 1994, order on that basis. MCR 2.612(C)(1)(a); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 382; 533 NW2d 373 (1995).

Defendant next asserts that the trial court erred in finding him in contempt of court for failure to pay child support, failure to report as provided by the 1989 stipulation, and failure to appear at the June 17, 1994, hearing. We disagree. A trial court has the power to issue an order of contempt to a party who disobeys or refuses to comply with an order to pay support, a party who disobeys any lawful order of the court, or a party who refuses or neglects to obey a subpoena. MCL 600.1701(f), (g), and (i); MSA 27A.1701(f), (g), and (i). A trial court's findings in a contempt proceeding must be affirmed on appeal if there is competent evidence to support them. *Cross Co v UAW Local 155*, 377 Mich 202, 218; 139 NW2d 694 (1966). There is ample evidence on the record before us to support the trial court's findings of contempt. *Id.* Defendant's conduct in this case is replete with instances of failure to report, failure to pay child support and failure to appear. We review the issuance of a contempt order for an abuse of discretion, *Deal v Deal*, 197 Mich App 739, 743; 496 NW2d 403 (1993), and find that the court was well within it discretion in issuing the contempt order.

Regarding his final claim, that the trial court abused its discretion when it issued a bench warrant without setting a sum certain amount necessary to purge the contempt order, defendant cites no authority other than a citation to the statute regarding acts punishable for contempt, MCL 600.1701; MSA 27A.1701, which is not relevant to this issue. Therefore, defendant has abandoned this claim. *Mallard, supra*. In any event, we find that the amount due was readily ascertainable by the conditions set forth in the contempt order and the warrant set a sum certain by which it could be satisfied. Defendant's claim in this regard is without merit. We note, however, that the bench warrant was recalled by the court in October 1995. Should the court deem it necessary to reissue a bench warrant to satisfy the order of contempt, any arrearage for increased support as ordered in the July 25, 1994, modification order should be made retroactive only to April 28, 1993, and calculations of amounts due should be made accordingly.

Affirmed in part, modified in part. Appellees substantially being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman

[1] Appellees rely upon *Waber v Waber*, unpublished opinion per curiam of the Court of Appeals, issued 11/25/91 (Docket No. 125017), in support of its argument that retroactive modification is not limited to the date on which the opposing party was noticed. However, apart from the fact that *Waber* is an unpublished opinion of this Court, we believe that it is distinguishable. In the instant case, there was a reporting event each quarter that served as a trigger by which the friend of the court was notified of defendant's duty and subsequent failure to report. Each quarter that defendant failed to report, the friend of the court could have complained, could have investigated and could have petitioned for modification. It did none of these. In *Waber*, on the other hand, there was no such triggering event that placed the friend of the court on notice that defendant had a duty to report and had failed to comply with this obligation.